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No. 95-1503

In the Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD MACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)(2), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (the chief of police or sheriff) shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. The question presented is whether the Brady Act exceeds Congress's power under the Commerce Clause or contravenes the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 66 F.3d 1025. The opinion of the district court (Pet. App. 26-50) is reported at 856 F. Supp. 1372.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1995. A petition for rehearing was denied on December 19, 1995. Pet. App. 24-25. The petition for a writ of certiorari was filed on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968 (GCA), 18 U.S.C. 921 *et seq.*, establishes a comprehensive federal regulatory scheme governing the manufacture and distribution of firearms in interstate commerce. Under the GCA, it is unlawful for certain persons, such as convicted felons and fugitives from justice, to receive or possess firearms in interstate commerce. See 18 U.S.C. 922(g). Under the GCA, it is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. See 18 U.S.C. 922(d).

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of its restrictions on gun transfers. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act requires the federal government to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once the national instant criminal background check system is in place, firearms dealers will be required (with certain exceptions) to contact that system to determine whether any legal impediment exists to the sale of a firearm. See 18 U.S.C. 922(t)(1)(A).

Because the national instant criminal background check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. Those interim provisions, which are the subject of this case, operate in relation to proposed transfers of handguns by federally licensed fire-

arms dealers. Under the interim provisions, firearms dealers who propose to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of the transferee's residence[1] with information about the proposed transfer, and may not make the transfer until five business days have elapsed after providing such notice. See 18 U.S.C. 922(s)(1)(A). If, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt or possession of a handgun would be illegal, then the transfer may go forward. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may also go forward after five days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).

To enable CLEOs to determine whether receipt of a handgun would be illegal, prospective handgun purchasers must provide firearms dealers with their name, address, and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I), 922(s)(3)(A). The dealer must then give that information to the jurisdiction's CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV). During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a

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[1] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,532, 37,534 (1994).

> reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local record-keeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2). It is the provision for a "reasonable effort to ascertain" whether receipt or possession of the handgun would be illegal to which petitioner objects.

Shortly after enactment of the Brady Act, the Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on, *inter alia*, the "reasonable effort" provision. See 95-1478 U.S. Br. App. 13a-17a.[2] ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," *id.* at 15a, "[e]ach * * * CLEO will have to set its own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction," *id.* at 14a-15a. ATF further explained that, while the Brady Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF also made clear

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[2] "95-1478 U.S. Br. App." refers to the appendix to the brief for the United States in response to the petition for a writ of certiorari in *Printz* v. *United States*, No. 95-1478 (petition filed Mar. 15, 1996).

that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on criminal history records. *Id.* at 14a. Finally, ATF stated that, in some circumstances, as when a CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do little or no research. *Ibid.*

The Brady Act does not require that a CLEO act to prevent the transfer of a handgun if the CLEO concludes that the purchaser's receipt of the gun would be illegal. Thus, if the CLEO determines, for investigative or law enforcement purposes, that the transfer should be permitted to go forward, the CLEO may decline to inform the firearms dealer that the transfer is unlawful. If, however, the CLEO finds no impediment to the proposed handgun sale, the records related to the referral from the firearms dealer must be destroyed. 18 U.S.C. 922(s)(6)(B)(i). And if the CLEO determines that the prospective purchaser's receipt of the handgun would be unlawful and so informs the dealer, the prospective purchaser may request that the CLEO provide written reasons for the determination within 20 business days. 18 U.S.C. 922(s)(6)(C). The Brady Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7).

2. Petitioner is the Sheriff of Graham County, Arizona. Pet. App. 3. He contended that the Brady Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. See *ibid.* The district

court held that the "reasonable effort" requirement contravenes the Tenth Amendment. *Id.* at 43. It determined, however, that the background check provision is severable from the remainder of the Act, including the five-day waiting period. *Id.* at 49.

Both parties appealed, and a divided panel of the court of appeals upheld the Brady Act in its entirety. Pet. App. 1-23.[3] The court concluded that the Brady Act does not transgress any "implied limitation on federal power," *id.* at 6, and that there is "nothing unusually jarring to our system of federalism" in the challenged provisions of the Brady Act, *id.* at 8. The court noted that this Court has rejected the argument that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," as "not representative of the law today." *Ibid.* (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982)).

The court rejected in particular petitioner's contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program." Pet. App. 8. The court explained that "[t]he constitutional evil that *New York* addressed was one recognized by several of [this Court's previous cases]: the federal government

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[3] The court of appeals decided this case in conjunction with a similar appeal and cross-appeal raising the same issues in a challenge brought by Jay Printz, the Sheriff of Ravalli County, Montana. See Pet. App. 1-3. Sheriff Printz has filed a separate petition for a writ of certiorari to review the judgment below. *Printz* v. *United States*, No. 95-1478 (filed March 15, 1996). We have suggested that the Court grant the petition for a writ of certiorari in *Printz*. See U.S. Br. at 10, *Printz* v. *United States*, No. 95-1478 (May 1996).

was attempting to direct the States to enact their own legislation or regulations according to a federal formula." *Id.* at 9. The court noted that "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program" raises Tenth Amendment concern, because that coercion impinges on the States' sovereign authority to set policy, and also undermines political accountability. *Id.* at 11. As the court explained, "[w]hen the federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely 'be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.'" *Id.* at 11-12 (quoting *New York*, 505 U.S. at 169).

The court concluded that the Brady Act "is not the kind of a federal mandate condemned by *New York*." Pet. App. 12. It stressed that CLEOs "are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and "are not even being asked to produce a state policy, for which the state must bear political accountability." *Ibid.* Moreover, it stated, CLEOs' "activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials." *Id.* at 13.

Although the court assumed that "there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment," it concluded that "the Brady Act does not approach that

point." Pet. App. 14. It observed that petitioner has not been subjected to any requirement to do more "than check computer records," and it stated that, on such a record, it "[could not] conclude that 'a reasonable effort' inevitably requires more than [a] minimum for [petitioner]. To perform such computer checks * * * has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns." *Ibid.*[4]

3. After the court of appeals issued its decision in this case, two other courts of appeals ruled on similar constitutional challenges to the Brady Act. The Second Circuit upheld the constitutionality of the Brady Act. *Frank* v. *United States*, 78 F.3d 815 (1996). The Fifth Circuit, however, held that the provisions of the Brady Act challenged in the present case violate the Tenth Amendment. *Koog* v. *United States*, 79 F.3d 452 (1996).

DISCUSSION

Petitioner contends that the Brady Act's interim requirement that CLEOs make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale violates the Tenth Amendment. Petitioner argues that the court of appeals' decision conflicts with *New York* v. *United States*, 505 U.S. 144 (1992). Those contentions are incorrect. The Brady Act is consistent with the long-settled understanding that Congress may impose certain duties on state officials to carry out federal law. It does not present the threats to sovereignty and accounta-

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[4] Judge Fernandez dissented in part. He would have held unconstitutional the Brady Act's requirement that CLEOs make a reasonable effort to determine whether the proposed transfer of a handgun would violate the law. Pet. App. 20-23.

bility, the values protected by the Tenth Amendment, that were present in the statute reviewed in *New York* v. *United States*.

Nevertheless, the Fifth Circuit has now ruled, in conflict with the decision below and with a decision of the Second Circuit, that the Brady Act does violate the Tenth Amendment. *Koog* v. *United States*, 79 F.3d 452 (1996). Because of the conflict in the circuits on the constitutionality of an Act of Congress, and the significance of the question of federal constitutional law presented by the petition, we have suggested that the Court grant certiorari in *Printz* v. *United States*, No. 95-1478, which also seeks review of the decision of the court of appeals in this case. Accordingly, this case should be held pending the final disposition of *Printz*. Alternatively, both petitions could be granted and the cases consolidated for briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be held pending the final disposition of *Printz* v. *United States*, No. 95-1478, and then be disposed of as appropriate in light of the disposition of that case. In the alternative, the petition for a writ of certiorari should be granted and the case should be consolidated for briefing and argument with *Printz*.

Respectfully submitted.

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